U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNATHON TAYLOR and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 00-283; Submitted on the Record;
Issued March 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on June 12, 1998, as alleged; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On June 14, 1998 appellant, a 64-year-old mailhandler,[1] filed a claim for traumatic injury alleged to have occurred on June 12, 1998.[2]

In a medical report dated September 15, 1998, Dr. Leslie A. Oshita, appellant's treating physician with the Kaiser Permanente Medical Group and Board-certified in internal medicine and occupational medicine, stated that appellant was examined on June 14, 1998 for a "three-day history of back pain." He noted, however, that when examined by the occupational medicine department on the following day appellant stated that he did not have a new injury to his back, but "wanted to 'speed up' the retirement process." Dr. Oshita then stated that appellant related the exacerbation of his back pain to a 1990 work-related incident, and was "unable, however, to specify a date and time while at work during which he experienced the worsening of his symptoms, nor a specific activity which precipitated the exacerbation."[3]

By decision dated November 6, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that the incident occurred at the time and date as alleged. By letter dated November 22, 1998, appellant requested an oral hearing. Appellant

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[1] Appellant did not return to work after June 12, 1998 and subsequently retired December 7, 1998.

[2] The Office had previously accepted appellant's claim for lumbar strain on November 19, 1990.

[3] This report was also relied on by the Office in its October 14, 1998 denial of appellant's recurrence of disability claim. The Office doubled the claims on August 25, 1999.

testified at his June 15, 1999 hearing that he had been on a modified work schedule since 1990 due to a work-related lumbar strain and that his work consisted of tagging (bar coding) mail and rewrapping small packages while standing and sitting. He noted that he never carried anything over 10 pounds and that he intermittently walked around the building. Appellant also stated that sometimes his back would become symptomatic which required time off, but that on June 12, 1998 he had had a recurrence, defined by appellant as "[s]omething that's already been there and then it flared up again." He stated that at that time he had been sitting down, leaning over, putting tags on mail when his back started to hurt "much worse" than other times when he would seek medical treatment. Appellant noted that his pain was so severe he went to the hospital in a wheelchair where he was diagnosed with sciatica, given pain pills and released. He noted that his treating physician recommended that he return to work in a wheelchair but that the employing establishment did not allow that.

In a decision issued and finalized August 17, 1999, the hearing representative affirmed the Office's denial. The hearing representative found that there were unexplained inconsistencies in appellant's history of injury including his denial on June 15, 1998, while being evaluated by the occupational medicine department at Kaiser Permanente Medical Group, that he did not have a new injury to his back, and his inability to cite a specific event to Dr. Oshita which caused his pain. The hearing representative noted the inconsistency with his June 14, 1998 attachment to his Form CA-1 wherein he stated that the injury occurred on June 12, 1998 while moving mail and light boxes as contrasted with his history of injury as related at the hearing where he related that he injured his back while sitting and putting tags on mail.

In a letter received by the Office on October 13, 1999, appellant requested reconsideration. By nonmerit decision dated October 25, 1999, the Office denied appellant's application for modification.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on June 12, 1998.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred.[4] An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[5] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[6] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to

[4] *Elaine Pendleton* , 40 ECAB 1143 (1989).

[5] *Charles B. Ward*, 38 ECAB 667 (1989).

[6] *Tia L. Love*, 40 ECAB 586 (1989).

work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.[7] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[8]

The Board finds that the evidence contains inconsistencies sufficient to cast serious doubt on appellant's version of the alleged June 12, 1998 employment incident. In a September 15, 1998 medical report, Dr. Oshita stated that, on June 15, 1998, appellant related no new injury to his back, but "wanted to 'speed up' the retirement process." He added that he related the exacerbation of his back pain to a 1990 work incident. Further, appellant could not identify a date and time at work when his symptoms worsened, nor identify a specific work activity which caused exacerbation of pain. Also, appellant stated in his initial claim that the work-related injury occurred on June 12, 1998, while he was moving mail and light boxes but then testified that he injured his back while he was in a sitting position, tagging mail.

Based on the inconsistent statements concerning appellant's claim for compensation in which he stated that the injury occurred on June 12, 1998 while moving mail, then stating that the injury occurred while tagging mail, and his subsequent statements wherein he alleged no new injury, the Board finds that appellant failed to meet his burden of proof to establish that the employment incident occurred as alleged and thus has failed to establish fact of injury on June 12, 1998.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[10] The only evidence appellant submitted with his request for reconsideration was duplicative of the evidence that was submitted to the record prior to the hearing representative's decision dated August 17, 1999.[11] Therefore, appellant failed to show that the Office erroneously applied or interpreted a specific point of law,

[7] *Merton J. Sills*, 39 ECAB 572 (1988).

[8] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b).

[11] The Office undertook to examine correspondence appellant sent to Senator Boxer, which included criticism of Dr. Oshita as well as correspondence appellant sent to the Office by letter dated September 27, 1999. In the latter, appellant challenged the employing establishment's statement regarding his duties on June 12, 1998. Given that the claim was denied on grounds that no incident was established, appellant's allegation is irrelevant.

failed to advance a relevant legal argument not previously considered by the Office, nor presented relevant and new pertinent evidence not previously considered by the Office with his request for reconsideration. Therefore, the Office properly denied his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 17, 1999 and November 6, 1998 are hereby affirmed.

Dated, Washington, DC
March 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member